Office - Supreme Court, U.S.
FILED
DEC 14 1984
ALEXANDER L. STEVAS.

No. 84-773

In the Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, ET AL., PETITIONERS

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

PAUL M. BATOR
Deputy Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
ROBERT V. ZENER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a public high school violates the Establishment Clause if it permits a voluntary student religious club to meet on school property during a student activities period in which all other voluntary student groups are permitted to meet.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Reasons for granting the petition	7
I. This case is an appropriate vehicle for resolving a major and recurring constitutional issue	7
II. The judgment of the court of appeals conflicts with this Court's decisions permitting religious speech on the same basis as other speech	9
A. The presumed greater impressionability of high school students is not a basis for permitting discrimination against religious groups	10
B. There is no other basis for distinguishing this Court's decision in *Widmar* v. *Vincent*	15
1. Compulsory attendance laws	15
2. Location of the meetings	16
3. Presence of adult monitor	17
4. Excessive entanglement	18
C. Allowing Petros meetings would be consistent with the fundamental principles of the First Amendment	19
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Bayer v. *Kinzler*, 383 F. Supp. 1164, aff'd, 515 F.2d 504	13
Board of Education v. *Pico*, 457 U.S. 853	13
Brotherhood of Locomotive Firemen v. *Chicago, R.I. & Pac. R.R.*, 393 U.S. 129	13
Eastland v. *United States Servicemen's Fund*, 421 U.S. 491	12
Gambino v. *Fairfax County School Board*, 429 F. Supp. 731	13

Cases—Continued: Page

Illinois ex rel. McCollum v. *Board of Education*, 333 U.S. 203 17
James v. *Board of Education*, 461 F.2d 566, cert. denied, 409 U.S. 1042 13
Katzenbach v. *McClung*, 379 U.S. 294 13
Katzenbach v. *Morgan*, 384 U.S. 641 13
Lubbock Civil Liberties Union v. *Lubbock Independent School District*, 669 F.2d 1038, cert. denied, 459 U.S. 1155 8
Lynch v. *Donnelly*, No. 82-1256 (Mar. 5, 1984) 19
McDaniel v. *Paty*, 435 U.S. 618 19
Minnesota v. *Clover Leaf Creamery Co.*, 449 U.S. 456 12-13
Niemotko v. *Maryland*, 340 U.S. 268 20
Rostker v. *Goldberg*, 453 U.S. 57 12
Russo v. *Central School District No. 1*, 469 F.2d 623, cert. denied, 411 U.S. 932 13
Seyfried v. *Walton*, 668 F.2d 214 13
Texaco, Inc. v. *Short*, 454 U.S. 516 12
Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 13
Walz v. *Tax Commission*, 397 U.S. 664 18-19
Widmar v. *Vincent*, 454 U.S. 263 ..... *passim*
Zorach v. *Clauson*, 343 U.S. 306 16

Constitution and statutes:

U.S. Const. Amend. I 1, 5, 8, 11, 13, 19, 20
Establishment Clause ..... *passim*
Free Exercise Clause 19

Equal Access Act, Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.* 1, 8
§ 802, 98 Stat. 1302 2
§ 803, 98 Stat. 1303 2
§ 803(4), 98 Stat. 1303 3

42 U.S.C. 1988 6

Miscellaneous:

American Association of School Administrators, *Equal Access: Interpretation and Implementation Guidelines* (1984) 2

Miscellaneous—Continued: Page

130 Cong. Rec. (daily ed. July 25, 1984):
p. H7724 12
p. H7727 12
1 *Debates and Proceedings in the Congress of the United States* (J. Gales ed. 1834) 20
Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983) 11-12
Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 98th Cong., 1st Sess. (1983) 12
H.R. Rep. 98-710, 98th Cong., 2d Sess. (1984) 8
M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978) .. 20
69 Op. Md. Att'y Gen. No. 84-031 (Dec. 6, 1984) 2
S. Rep. 98-357, 98th Cong., 2d Sess. (1984) 2, 7-8, 9, 11, 15

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-773

MICHAEL BENDER, ET AL., PETITIONERS

v.

WILLIAMSPORT AREA SCHOOL DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The question in this case is whether the First Amendment requires a public high school to exclude a voluntary student religious club from meeting on school property during a student activities period in which all other voluntary student groups are permitted to meet. The interest of the United States arises from the fact that Congress has recently addressed the issue.

After extensive hearings and debate, the Equal Access Act (Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.*) (set forth in full at Pet. App. 113a-115a) was passed by the House of Representatives (by a 337-77 vote) and the Senate (by an 88-11 vote), and signed by the President on August 11, 1984. The Act makes it unlawful for any public secondary school receiving federal aid and having a "limited open forum" to deny access to students who wish to conduct a meeting, on the basis of "the religious, political, philosophical, or other content of the speech at such meetings." "Limited open forum" is defined as granting access for noncurriculum-related student

groups to meet on school premises "during noninstructional time," which is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." The school "is deemed to offer a fair opportunity to students" if it provides, on a uniform basis, that meetings be "voluntary and student-initiated"; that there be "no sponsorship of the meeting by the school"; that "employees or agents of the school or government [may be] present at religious meetings only in a nonparticipatory capacity"; and that "non-school persons may not direct, conduct, control, or regularly attend" such meetings. §§ 802, 803, 98 Stat. 1302, 1303.

The court of appeals held, by a divided vote, that a public high school would violate the Establishment Clause by allowing a voluntary religious club to meet on school premises during a student activities period. If allowed to stand, the decision of the court of appeals would cast doubt on the constitutionality of the Equal Access Act, and would frustrate the congressional objective of resolving the constitutional issue with a minimum of additional, costly litigation. See S. Rep. 98-357, 98th Cong., 2d Sess. 12, 21 (1984).[1]

---

[1] One State Attorney General, in reliance on the decision below, has formally opined that the Equal Access Act is unconstitutional, and has, in effect, instructed State educational officials not to comply with it. 69 Op. Md. Att'y Gen. No. 84-031 (Dec. 6, 1984). The American Association of School Administrators has distributed guidelines for implementing the Equal Access Act, which are prefaced by the advice that states covered by the Third Circuit (among others) "could be out of compliance with previous circuit court rulings if they act to implement the law." American Association of School Administrators, *Equal Access: Interpretation and Implementation Guidelines* 1 (1984). These examples demonstrate that the decision below is having a direct effect on implementation of the Act.

The court below relied principally on its perception that high school students are not sufficiently mature to understand that granting religious groups equal access would not constitute school endorsement of religion—a view expressly investigated, and rejected, by Congress in its factfinding capacity (*id.* at 9-10, 34-35). Other factors relied on by the court below are also likely to be present in cases covered by the Equal Access Act, including the use of school premises for meetings and the presence of adult monitors.[2] If the court of appeals' reasoning is accepted, most situations covered by the Equal Access Act might also be viewed as constituting an official endorsement of religion.

STATEMENT

1. Williamsport Area High School is located on a 147-acre campus, more than a mile from the nearest residence (C.A. App. A239, A248-A249). Most students are bused to the school (*id.* at A246). The school day starts at 7:45 a.m., with a 12-minute homeroom period, during which attendance is taken and announcements made (*id.* at A365).

On Tuesdays and Thursdays, the opening homeroom period is followed by a 30-minute period for

---

[2] The court of appeals also relied in part on the fact that the activities period at the Williamsport Area High School took place during hours of compulsory school attendance for most of the students (*i.e.*, those seventeen or younger). Pet. App. 8a, 25a, 30a-31a, 42a. The Equal Access Act applies only where the student activities occur "before actual classroom instruction begins or after actual classroom instruction ends" (§ 803(4), 98 Stat. 1303). However, as this case illustrates, where the activities period occurs at the beginning of the day (or after a brief opening homeroom during which no instruction occurs), the language of the Act would appear to apply despite the fact that the activities period is covered by compulsory attendance laws. Thus in this respect as well, the decision below may conflict with applications of the Equal Access Act.

extracurricular student activities (Pet. App. 69a n.5). During this period, students may attend student club meetings, study in the library, visit the computer station, examine career or college placement materials, or stay in their homerooms (*id.* at 7a-8a). The student clubs that meet during this activities period are entirely voluntary (*id.* at 8a). There is no written policy concerning what type of club may be allowed to meet. However, the principal stated that he would permit any lawful club that would "contribute to the intellectual, physical or social development of students" (*id.* at 9a; C.A. App. A367). This principal has served since 1974; in his memory, no student club had ever been denied permission to meet, until this case (Pet. App. 8a).

This case arose out of a request by students at the school to form a club for the purpose of meeting to read and discuss the Bible and to pray. The club (called "Petros") agreed not to publicize its meetings through the school's public address system, bulletin board, or newspaper. Pet. App. 33a. The club was initially allowed to meet during the activities period. The first meeting was attended by 45 students (out of a student body of 2,500). *Id.* at 4a-6a, 68a-71a. In accordance with school policy, a teacher was present during the meeting, took attendance, and thereafter sat in the room grading papers (*id.* at 9a-10a, 69a-70a). After the first meeting, the school superintendent obtained an opinion of counsel to the effect that allowing the club to meet on school property would violate the Establishment Clause. On this basis, the superintendent denied the club further permission to meet during the activities period. The students were offered the alternative of released time during which they could conduct their meetings away from school property. *Id.* at 71a-72a. While the record does not show why they declined this alterna-

tive, it was obviously impractical in view of the location of the school (over a mile from the nearest residence) and the brief duration of the activities period (30 minutes).

The superintendent's decision was affirmed by respondent School Board (Pet. App. 72a). The Board's action was based solely on advice of counsel that "[p]resent law simply does not permit public schools to authorize or support religious activities on school property" (*id.* at 6a; C.A. App. A235). The Board has never suggested any programmatic or educational reason for excluding the group.

2. The students then brought this action for declaratory and injunctive relief against the School Board and its members, in both their individual and official capacities. Relying on *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the district court held that the high school had created a "limited public forum" by establishing an activities period open to any legitimate student activity, and rejected the Board's argument that allowing Petros to meet would violate the Establishment Clause. Since this was the only rationale for the exclusion, the district court concluded that under the First Amendment this "content-based decision to exclude subject matter" could not stand. Pet. App. 81a-82a.[3]

---

[3] The district court acknowledged that if the activities period were part of the school's curriculum, the superintendent would have had wide discretion to limit subject matter as part of his power to define the curriculum. However, the court pointed out that the sole reason offered for excluding Petros was legal advice regarding the Establishment Clause; the superintendent never purported to be exercising his authority to define the curriculum. Pet. App. 82a-85a.

After the district court decision, respondent School Board decided to comply with the decision and not to appeal. Respondent John C. Youngman, Jr., a member of the Board and parent of children in the school system, appealed. A divided panel of the court of appeals reversed. While agreeing that the school had created a limited public forum in its activities period, and thus that the students had a "valid first amendment interest to engage in their proposed activity" (Pet. App. 20a-21a), the court "balanc[ed] the respective constitutional interests [free speech and nonestablishment] which would be lost and gained if Petros were granted access to the activity period" (*id.* at 42a), and concluded that "there is a greater vindication of the protections of the Constitution if the Establishment Clause prevailed in this instance" (*id.* at 43a).

As a result of the court of appeals' decision, the School Board has reverted to its former policy of denying the students the right to participate in the activities period (Pet. App. 109a-110a).[4]

---

[4] There unquestionably remains a case or controversy, since the student petitioners continue to desire to meet, and the School Board continues to refuse permission. That the School Board is a nonlitigating respondent (in effect, a disinterested "stakeholder") does not affect this, since the Board (by complying with the court of appeals' judgment and by resisting attorneys' fees) has in effect treated the appeal by respondent Youngman as its own. See Pet. 8-9 n.7. Nor has the end of respondent Youngman's tenure as a Board member rendered the case moot in a technical sense as to him. The only way for him to challenge petitioners' entitlement to attorneys' fees under 42 U.S.C. 1988 was for him to appeal the underlying judgment.

These matters were brought to the attention of the court of appeals (see Pet. for Reh'g 5 n.2), which implicitly held that the case remained justiciable.

REASONS FOR GRANTING THE PETITION

I. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING A MAJOR AND RECURRING CONSTITUTIONAL ISSUE

This case raises one of the most significant and hotly-contested issues in the area of free speech and religion: whether high school students wishing to meet for purposes of voluntary, student-initiated, and student-directed religious speech must be excluded from forums within the high school otherwise available to all.

As this case illustrates, the conflict is generally not between the students and the high school authorities, but between students and a view of the law—a view that equal treatment of religious speech in the high school setting would somehow violate the Establishment Clause of the First Amendment. Here, as elsewhere, high school authorities have determined that the students would benefit from the opportunity to meet together for student-initiated, student-directed activities of their choice. C.A. App. A244, A276. The principal and school board have not sought the role of censor; they are willing to allow the students to choose their own topics of interest, including religious matters. But here, as elsewhere, the school authorities have been advised by their attorneys that they must—as a matter of constitutional law—restrict their students' activities to the non-religious. Pet. App. 66a. The result is to diminish both the liberty of the students and the discretion of the school authorities.

Conflicts such as this are increasingly frequent and should be resolved. In its recent investigation into the issue, Congress found that "many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity." S. Rep. 98-357, 98th Cong., 2d

Sess. 6 (1984); accord, H.R. Rep. 98-710, 98th Cong., 2d Sess. 3 (1984). The reason, Congress found, is not "malevolence toward religion" but the administrators' "erroneous[] belie[f] that the Establishment Clause prohibits students from engaging in such speech at all, even when other types of extracurricular student speech are permitted." S. Rep. 98-357, *supra*, at 6; accord, H.R. Rep. 98-710, *supra*, at 3, 4. The principal reason for passage of the Equal Access Act (Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.* (Pet. App. 113a-115a)) was to "clarify and confirm" the First Amendment rights of students in this context, and thereby "resolve the dilemma" faced by school administrators in reconciling the assertedly conflicting demands of free speech and nonestablishment. S. Rep. 98-357, *supra*, at 3, 21.

As the district court below stated (Pet. App. 101a), guidance from this Court is needed to resolve the issue. We believe this case is an appropriate vehicle for the Court to consider the question, for two reasons.

First, the record and the extensive factual findings of the district court present the legal issue sharply and clearly, and the thorough opinions below have fully fleshed out the relevant areas of legal dispute. Moreover, this case presents the paradigm of the "equal access" issue, without any extraneous or unusual factors (such as school administration involvement in supporting religious activities) that would cloud the issue. Cf. *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 1983).[5]

---

[5] The history of prior school promotion of religious activities in *Lubbock* distinguishes that case, in which this Court denied a petition for a writ of certiorari.

Second, the congressional objective of prompt resolution of this issue is frustrated by continued uncertainty. Further exploration of the issues by the lower federal courts is not necessary; on the contrary, both student groups and school administrators would profit by a definitive answer. As the Senate Report noted, continued uncertainty is resulting in a general practice of restraint of constitutionally protected speech (S. Rep. 98-357, *supra*, at 14-15), as well as substantial expenditures of taxpayers' money on litigation (*id.* at 21).

This case did not arise under the Equal Access Act, which was passed by the Senate one day after the court of appeals rendered the judgment below. It does not, therefore, raise any issue regarding the scope or meaning of the Act. However, the Establishment Clause issues raised by this case are identical to those that will be raised by applications of the Act under similar circumstances. There is no reason for the Court to await a case filed pursuant to the Act to resolve these issues.

II. THE JUDGMENT OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISIONS PERMITTING RELIGIOUS SPEECH ON THE SAME BASIS AS OTHER SPEECH

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court held that the University of Missouri at Kansas City had created a limited public forum by making its facilities available for a broad spectrum of student groups, and that having done so, it could not close its facilities to a group wishing to engage in religious worship and discussion. The Court specifically held that permitting religiously oriented groups, among a broad spectrum of other groups, to use University facilities would not violate the Establishment Clause, because a neutral policy of equal access does not convey "any imprimatur of state approval" of religious activities (454 U.S. at 274).

However, in a footnote the Court noted that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion" (454 U.S. at 274 n.14). Seizing on this remark, the court of appeals sought to distinguish *Widmar* on the ground that more impressionable high school students might view the school's action in allowing a religious group to meet as an official endorsement of religion, rather than as official neutrality.

We submit that neither the "impressionability" factor nor any of the other grounds proposed by the court of appeals for distinguishing *Widmar* can withstand analysis.[6] When a limited open forum has been created, whether in a public high school or in a university, the Constitution does not demand that religious groups be singled out for exclusion from it.

A. The Presumed Greater Impressionability Of High School Students Is Not A Basis For Permitting Discrimination Against Religious Groups

Judge Adams, in his dissent below, correctly stated that "there is no clear constitutional distinction based on the comparative intellectual capacities of 14-18 year olds as opposed to 18-22 year olds" (Pet. App. 48a-49a). The court of appeals has "forge[d] a constitutional principle, with all the rigidity which it invariably creates, from vague impressions of the emotional sophistication of high school students" (*id.* at 49a). The majority's "impressions" differ from the district judge's conclusion in this case (*id.* at 93a-

---

[6] Indeed, in one important respect, the instant case is less troublesome than *Widmar*. Here, unlike in *Widmar*, the school authorities are willing to permit the students to meet for religious purposes, provided they can do so legally. The concerns of the dissenting opinion in *Widmar* regarding compelling the University against its will to allow the students to meet are therefore absent here.

94a), as well as from congressional findings made in connection with the recent passage of the Equal Access Act. Moreover, they are inconsistent with the view adopted by this and other courts in decisions holding that First Amendment protections of free speech apply to students below the college level.

1. In passing the Equal Access Act, Congress took issue with the notion that high school students are too impressionable to understand that the school's neutral treatment of a religious club would not constitute official endorsement of religion. The Act, which forbids public secondary schools with "limited open forums" from excluding activities on the basis of their religious content, is premised on a congressional finding that high school students are mature enough to understand the difference between school accommodation of religion and school endorsement.

The Senate Report on the legislation stated: "[t]he Committee finds that students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led, religious speech on the one hand and student-initiated, student-led, religious speech on the other." S. Rep. 98-357, *supra*, 35; see *id.* at 9-10. This "exercise of [the Committee's] fact-finding powers" (*id.* at 9) was based in part on the expert views of psychologists (*id.* at 35), and in part on the testimony of many witnesses, including high school students (*id.* at 10).[7] Supporters

---

[7] For example, a high school student from Sonoma, California testified:

> They also have a smoking section in our school. Does that mean that the school sanctions, supports and encourages smoking? I doubt it, just because the school allows a group to meet, doesn't mean it approves of and supports their activities. The same should hold for religious groups.

Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary,

of the legislation in the House expressed a similar view.[8]

Where Congress has made findings of fact in the discharge of its legislative function, due regard for the separation of powers and for the ability of the legislature to gather information and analyze issues of legislative fact (see *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504-505 (1975)) requires that courts defer to congressional determinations, even for purposes of constitutional adjudication, unless those determinations can be said to be irrational. See, *e.g.*, *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532-533 (1982); *Rostker* v. *Goldberg*, 453 U.S. 57, 74, 80-83 (1981); *Minnesota* v. *Clover Leaf*

98th Cong., 1st Sess. 64 (1983) (testimony of Sarah Scanlon). Another student, from Lubbock, Texas, testified:

> Some people are worried that high school students are very impressionable, and that we can't make decisions and that we are naive. I feel that that is pretty naive on the part of the people who think that. I don't think that is true at all.

Id. at 60 (testimony of Bonnie Bailey). See also, *e.g.*, *ibid.* (testimony of Lisa Bender); *Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 39 (1983) (testimony of C. Luke Thornton, Principal of John I. Leonard High School, Lake Worth, Fla.).

[8] See, *e.g.*, 130 Cong. Rec. H7727 (daily ed. July 25, 1984) (remarks of Rep. Roukema) (disputing claim that "allowing religious groups to meet in the school under any circumstances will have the effect of advancing religion because of the impressionability of high school students" and stating that "studies of adolescent psychology * * * have shown that it is a time of increased cognitive capacity, marked by an ability of the adolescent to differentiate himself from authority figures he depended upon as a younger child"); *id.* at H7724 (remarks of Rep. Frank) ("I regard this as a very auspicious day [for] * * * those of us who think we ought not infantilize teenagers.").

Creamery Co., 449 U.S. 456, 464 (1981); *Brotherhood of Locomotive Firemen* v. *Chicago, R.I. & Pac. R.R.*, 393 U.S. 129, 136, 138-139 (1968); *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966); *Katzenbach* v. *McClung*, 379 U.S. 294, 299-301 (1964). As Justice Harlan stated in his dissenting opinion in *Katzenbach* v. *Morgan*, 384 U.S. at 668, "[t]o the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to respect." Particularly in this case, where the court of appeals' conclusions regarding student immaturity were based on pure speculation, and where the district judge came to a contrary conclusion, the Congressional findings—based as they were on actual testimony—should carry considerable weight.

2. The decision below conflicts with decisions of this Court and lower courts regarding application of the First Amendment free speech clause to public secondary schools in other contexts. These decisions presuppose that high school students are capable of learning from exposure to a diversity of viewpoints, without confusing free expression with official orthodoxy. See, *e.g.*, *Board of Education* v. *Pico*, 457 U.S. 853 (1982) (plurality); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Seyfried* v. *Walton*, 668 F.2d 214, 219-220 (3d Cir. 1981) (Rosenn, J., concurring); *Russo* v. *Central School District No. 1*, 469 F.2d 623, 633 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973); *James* v. *Board of Education*, 461 F.2d 566, 574 (2d Cir.), cert. denied, 409 U.S. 1042 (1972); *Gambino* v. *Fairfax County School Board*, 429 F. Supp. 731, 736-737 (E.D. Va. 1977); *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975) (Table).

Moreover, it is the professional educators, not Congress or the courts, who decided that the students of

Williamsport Area High School are capable of participating in the free exchange of ideas characterized by a limited public forum.[9] This decision should not be selectively abrogated by the courts merely because religion is involved.

3. If high school students, unlike college students, would construe approval of a religious club's request for permission to meet as endorsement of religion, why would they not also construe disapproval of the application as official hostility to religion—a result equally at variance with the Establishment Clause? Indeed, the district judge in this case concluded that a policy of singling out religious groups for exclusion from the school's activities period could well be viewed by the students as manifesting official hostility toward religion. Pet. App. 97a.[10]

---

[9] The Equal Access Act does not limit the discretion of school officials in deciding whether to create a forum for free expressive activity; it merely provides that, if such a forum is created, the school may not "deny equal access or a fair opportunity" to students "on the basis of the religious, political, philosophical, or other content" of their speech.

[10] The School Board itself apparently recognized that its action might be construed as hostility toward Petros' religious character. The letter from the Board to the students explaining the decision included the following (Pet. App. 6a; C.A. App. A235):

> Please be assured that neither the School Board, nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

It is not surprising that the Board apprehended that its action might be construed as hostile or discriminatory, since, as the court of appeals noted (Pet. App. 8a), Petros is the only proposed student club or activity ever denied the right to participate in the school's activities period during the memory of the principal.

The impression of state hostility to religion caused by exclusion of religious groups is not unique to this case. In its consideration of the Equal Access Act, Congress heard testimony to that effect from students, and found that many students have in fact perceived their schools' refusal to allow religious activity as manifesting discrimination and official hostility. The Senate Committee concluded that "students reasonably perceive the denial of access for religious speech as State hostility toward religion" (S. Rep. 98-357, *supra*, at 36), and stressed that "[t]he perception of State hostility is not a speculative one created by the Committee, but one held by students as evidenced by the testimony of the students themselves." *Id.* at 11, 19-20.

If it were true that high school students are too immature to appreciate the difference between neutral school actions and endorsement of (or hostility towards) religion, then school officials could not avoid violating the Establishment Clause, whether they granted or denied a request for equal access. *Any* action on a religious group's request for permission to meet would convey a state position regarding the merits of religion, according to this view. The only way out of the dilemma would be for the school to close its limited public forum—that is, to forbid any voluntary student activities on school property. Surely the Constitution does not require such a result.

B. There Is No Other Basis For Distinguishing This Court's Decision In *Widmar* v. *Vincent*

The court of appeals cited several additional grounds for not applying the teaching of *Widmar* v. *Vincent* in this setting. None of these has merit.

1. *Compulsory attendance laws.* Compulsory attendance laws may necessitate some limitations on the speech and conduct of teachers and school officials that might take advantage of the "captive audience"

of public school students. But they provide no basis for limiting the free speech of the students themselves. So long as the students may freely choose among a wide range of activities and topics, there is no compulsion. Indeed, the court of appeals itself acknowledged (Pet. App. 18a):

> [T]he activity period at Williamsport Area High School provides a forum for self-expression, by which students exercise their own discretion in deciding which organizations, if any, to support. Indeed, unlike compulsory instructional classes, which are created and designed by the school authorities, the very existence of such organizations depends entirely upon voluntary student participation and interest.

The released time program sustained by the Court in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), also took place during a period of compulsory attendance; the religious classes to which students were released took attendance and sent back to the public school a list of released students who failed to report for religious instruction. Nevertheless, the Court rejected the charge of coercion, on the ground that "the school authorities are neutral * * * and do no more than release students whose parents so request" (343 U.S. at 311).

2. *Location of the meetings.* The court of appeals also distinguished this case from *Zorach* and *Widmar* on the ground that the meetings took place on school property in a more controlled environment than a university.[11] Therefore, the court concluded, "involuntary contact between nonparticipating students and

---

[11] The opinion below states that the club meetings "would be held in a classroom which, a few minutes after the meeting, is also used for regular secular classes" (Pet. App. 26a). In fact, the record shows that the club met in the school cafeteria. C.A. App. A228; Pet. App. 107a.

religious groups is inevitable. Students of differing or conflicting creeds would therefore be less able to overlook the activities of such a group within their school, and by the same token would be more likely to perceive a message of endorsement by school authorities * * *." Pet. App. 26a, 28a. However, the meetings of the religious group involved in *Widmar* also took place on university property, in classrooms and in the student center (454 U.S. at 265 n.2). The Williamsport Area High School is located on a 147-acre campus and has 2,500 students—a size comparable to many smaller college campuses. Some 25 other clubs were authorized to meet during activities period, in addition to other competing activities (homeroom, computer station, career counseling and library), as compared to some 100 clubs in *Widmar* (not necessarily all meeting at the same time). In addition, the club in this case has agreed to forego usual school bulletin boards and other organs of publicity (a restriction not undertaken in *Widmar*). In short, there is no basis for concluding that Petros was any more "visible" than the club involved in *Widmar* or similar clubs at other college campuses.[12]

3. *Presence of adult monitor.* The court of appeals concluded (Pet. App. 26a-27a) that the required presence of an adult monitor "necessarily must impart

---

[12] There is no merit to the court of appeals' reliance (Pet. App. 27a-28a, 31a) on *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203 (1948). As this Court stated in *Widmar*, 454 U.S. at 271-272 n.10 (emphasis in original):

> Because this case involves a forum already made generally available to student groups, it differs from those cases in which this Court has invalidated statutes permitting school facilities to be used for instruction by religious groups, but *not* by others. See, *e.g.*, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). In those cases the school may appear to sponsor the views of the speaker.

the impression to students that the school's authority and that the school's endorsement is implicated in the relevant activity, since every monitor must be approved by the school." However, the record makes clear that the only function of the monitor is to take attendance and to maintain order. The district court correctly concluded that "[i]nasmuch as the teacher would be present only to ensure orderly meetings, the instant situation would involve no more entanglement than when a state provides for 'the safety, security and general convenience' for persons attending the celebration of a Mass at the National Mall; or provides police and fire protection to a church" (Pet. App. 99a-100a (footnote and citations omitted)).

4. *Excessive entanglement.* The court of appeals concluded that the club's commitment not to use the school's newspaper, bulletin boards, or public address system—a commitment not made in *Widmar*—would entail "excessive entanglement" (Pet. App. 33a-34a). However, this purported distinction is based on a misunderstanding. The court of appeals apparently understood the students' commitment as distinguishing between "religiously oriented material" and other announcements (*id.* at 33a); this would require the school officials "to interpret the posted announcements in order to distinguish religious from non-religious content" (*id.* at 34a). However, the club's commitment was to forego *all* use of the bulletin board, public address system or newspaper to publicize their meetings—a commitment which, as Judge Adams pointed out (*id.* at 59a), "represents a simple, easily-administered rule" that does not require the school authorities to distinguish religious from non-religious content.

Indeed, as Judge Adams observed, enforcing a ban against religious meetings could prove to be far more "entangling" (Pet. App. 59a). Cf. *Walz* v. *Tax Com-*

mission, 397 U.S. 664, 674-675 (1970) (granting tax exemptions to churches gives rise to lesser government involvement than would taxing them). For example, assume that the students involved in Petros, or other students of a known religious orientation, were to form a Philosophy and Ethics Club. How could the school be sure that this club was not a "cover" for religious meetings? Presumably the adult monitor would have to keep a close and continuous watch over what the students said and did at each meeting to "determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove to be an 'impossible task in an age where many and various beliefs meet the constitutional definition of religion.' " *Widmar*, 454 U.S. at 272 n.11. In essence, the school would have to assume a continuing role of religious censorship over such a club's meeting—a role totally offensive to the values of the First Amendment.

C. Allowing Petros Meetings Would Be Consistent With The Fundamental Principles Of The First Amendment

The Establishment Clause, no less than the Free Exercise Clause, was intended to advance the cause of individual choice and religious liberty. The focus of the Establishment Clause is on prohibiting government establishment of a religious orthodoxy; on promoting "diversity and pluralism in all areas." *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 8. The drafters of the Bill of Rights had no intention to place religionists or religious speech under any special disabilities, even within the public arena. See *McDaniel* v. *Paty*, 435 U.S. 618, 637, 641 (1978) (Brennan, J., concurring).

Indeed, it is no exaggeration to state that the result below is *directly contrary* to the original in-

tent, and that it interprets the Establishment Clause in a manner expressly feared and sought to be avoided by its drafters. The principal point of criticism of the early drafts of the Establishment Clause by members of the First Congress was that it might be interpreted in a way that would be "extremely hurtful to the cause of religion." 1 *Debates and Proceedings in the Congress of the United States* 758 (Aug. 15, 1789) (J. Gales ed. 1834) (remarks of Rep. Huntington); see also *id.* at 757 (remarks of Rep. Sylvester). The response of James Madison, principal author of the draft Amendment, was that "the object it was intended to prevent" was that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform" (*id.* at 758-759; see also *id.* at 758). A policy of equal access for all groups is precisely the ideal envisioned by the Founders. An exclusion of religious groups from a forum otherwise open to all offends the very core of the First Amendment. *Widmar* v. *Vincent*, *supra*; *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); see generally M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 6-17 (1978).

This case does not require the Court to explore the limits of affirmative accommodation of religion; the student petitioners ask only that they be treated in the same way as any other student group. See *Widmar* v. *Vincent*, 254 U.S. at 273 n.13. They seek tolerance, equal treatment, nondiscrimination. This case thus touches on the values of the First Amendment at a particularly profound and sensitive level. The question whether, in this setting, the Establishment Clause authorizes the singling out of religious speech for direct discriminatory prohibition is one that this Court should promptly decide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

PAUL M. BATOR
Deputy Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
ROBERT V. ZENER
Attorneys

DECEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10113